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Recent Developments: County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation: The Indian General Allotment Act Permits Counties to Impose Ad Valorem Taxes but Not Excise Taxes on Patented Land Owned by Tribes and Tribe Members

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on the Act, the Supreme Court restated that the Act was constitutional and that it required a broad interpretation to protect citizens' equal enjoyment of the right to vote. *Presley*, 112 S. Ct. at 827. Further, the Court noted that the Act was aimed to protect citizens from subtle, as well as obvious, state efforts to deny the right to vote. *Id.*

The Court made clear that the initial step in analyzing claims under section 5 was to determine whether, or not, the changes altered the election law. *Id.* at 828. The Court found four basic typologies indicative, though not exhaustive, of section 5 claims. *Id.* Those typologies involved changes affecting the manner of voting, the candidacy requirements and qualifications, the composition of the electorate, or the creation or abolition of an elective office. *Id.* As a general rule, the Court said that a change must have "a direct relation to voting and the election process." *Id.* at 829.

The appellants, joined by a brief for the United States as amicus curie, argued that the Common Fund Resolution fell within the Act's coverage because the value of each vote had been diminished. *Id.* They reasoned that the value of each vote decreased because the authority of each commissioner decreased. *Id.* Thus, the redistricting system designed to ensure black representation became a token gesture.

The Court, however, defined voting power as being dependant upon increases or decreases in the number of officials, not in the individual power an official holds while in office. *Id.* The Court opined that without drawing a restrained line between governmental decisions affecting voting and those that do not, section 5 would become an omnipotent statute applicable to virtually all facets of governmental activity. *Id.*

As to the Unit System, the Court found that delegating authority to an appointed official was possibly analogous to the replacement of an elected official with an appointed one. *Id.* at 830. Nevertheless, the Court held that

reallocations of authority within government could not constitute voting changes. *Id.* Furthermore, the Court stated that intraconstituency and interconstituency changes in authority may have affected voters, but neither case presented a change in voting for purposes of the Act. *Id.* at 831.

The Court also recognized that the Attorney General's administrative interpretation deserved considerable deference, but noted that "[d]eference does not mean acquiescence." *Id.* The Court determined that Congress unambiguously stated that section 5 only covered changes in the rules governing voting. *Id.* at 833. As such, the Court found the Attorney General's position contrary to the Act and, therefore, not entitled to a high degree of deference. *Id.*

The Court affirmed the decision of the district court but supplanted their own standard that a change must directly relate to the voting process to offend section 5. By making federal law more predictable to the states, the Court sought to enforce federalism as a "practical system of governance and not a mere poetic ideal." *Id.*

In dissent, Justice Stevens, joined by Justices White and Blackmun, pointed to the definition of "voting" given in the Act which includes "all action necessary to make a vote effective." *Id.* at 835 (emphasis added). Justice Stevens coupled this expansive language to the historical deprivation of the right to vote and created a litmus test for deciding whether section 5 would apply. He concluded that whenever significant changes toward the disposition of power were made after a black person had assumed a position of power not historically held, those changes should be held suspect. *Id.* at 838.

It is likely that the Court will use cases such as these as mechanisms to federal restraint. By restrictively defining key terms, the Supreme Court can severely curtail the social effects of federal legislation. The Voting Rights Act provided a system of quick review

of suspect changes in power. Such claims may now be forced through the more expensive and circuitous court system.

- Brett R. Wilson

County of Yakima v. Confederated Tribes and Bands of the Yakima Indian Nation: **THE INDIAN GENERAL ALLOTMENT ACT PERMITS COUNTIES TO IMPOSE AD VALOREM TAXES BUT NOT EXCISE TAXES ON PATENTED LAND OWNED BY TRIBES AND TRIBE MEMBERS.**

In an opinion delivered by Justice Scalia, the Supreme Court in *County of Yakima v. Yakima Indian Nation*, 112 S. Ct. 683 (1992), upheld and remanded the decision of the Ninth Circuit Court of Appeals holding that the Indian General Allotment Act ("Act"), permits a county to impose an *ad valorem* tax upon land patented in fee, but does not permit a county to impose an excise tax upon the sale of such land. After reviewing land allotment to Indian tribes since the seventeen hundreds to establish the purpose of the Act and how Congress intended it to affect the Indian nations, the Court concluded the Act was not implicitly repealed by subsequent acts of Congress.

This case involved approximately 1.3 million acres of land, mostly in Yakima County, of which eighty percent was held in trust by the United States. The remaining twenty percent was held in fee patent by Indians and non-Indians. Most of the property was located in Yakima County, Washington. Yakima County ("the County") imposed an *ad valorem* levy on taxable real property and an excise tax upon the sale of the land held in fee patent. When Yakima Indian Nation, ("Yakima Nation"), the owners, refused to pay these taxes, the County attempted to foreclose on their property.

Yakima Nation sought injunctive and declaratory relief in the Federal District Court for Washington State on

the basis that the Act prohibits taxes on fee patented land held by tribes or Indians. The district court granted Yakima Nation summary judgment and an injunction prohibiting tax collection. On appeal to the ninth circuit, the appellate court reversed in part holding that whereas excise taxes were impermissible, *ad valorem* taxes were allowed, as long as they did not have a “‘demonstrably serious’ impact on the ‘political integrity, economic security, or the health and welfare of the tribe,’” and remanded the case to the district court. *Id.* at 687. The Supreme Court granted certiorari.

The Court began its analysis by examining congressional acts pertaining to the protection of Indian rights. The Court first noted that in 1887, Congress had enacted the Indian General Allotment Act in order to extinguish tribal sovereignty, erase reservation boundaries and force the assimilation of Indians into society at large by granting land to tribe members individually. The Act additionally protected Indians from having their land fraudulently purchased from under them by holding the land in trust for twenty-five years by the United States.

The Court then examined the Burke Act of 1906 which stated that Indians and tribes were not held accountable under state or territory laws until their trust period had expired. *Id.* at 686. Finally, the Court analyzed the Indian Reorganization Act of 1934 which ended allotments to Indians and emphasized tribal self-determination and self-governance. *Id.* It further noted that this Act made no attempt to undo the allotment years by imposing restraints on the Indians’ ability to alienate or encumber the land, or by impairing the rights of non-Indian title holders who held over two-thirds of the allotted Indian lands. *Id.* at 687.

Regarding the issue of whether Congress explicitly permitted taxation upon these lands, the Court agreed with the County’s contention that the Act gave express authority to tax fee patented land upon the expiration of a

trust period. *Id.* at 688 (citing *Goudy v. Meath*, 203 U.S. 146, 149 (1906)). The Court further agreed with the ninth circuit stating that Congress “manifested a clear intention to permit a state to tax” Indian fee patented lands in the Burke Act. *Id.* (citing *County of Yakima v. Yakima Indian Nation*, 903 F.2d 1207, 1211 (9th Cir. 1990)).

The Court rejected Yakima Nation’s contention that the Burke Act was implicitly repealed by the Indian Reorganization Act based on Congress’s definition of “Indian country” as including “all fee land within the boundaries of an existing reservation,” held by Indians or non-Indians, and as preempting state criminal laws within “Indian Country” insofar as offenses by and against Indians were concerned. *Id.* at 689 (citing *Moe v. Confederated Salish & Kootenai Tribes*, 425 U.S. 463 (1976)). The Court also disagreed with the Tribe’s assertion that the Act was impliedly repealed in 1953 when Congress enacted Public Law 280 which authorized states in certain circumstances to assume civil and criminal jurisdiction over Indians within “Indian country.” *Id.*

Noting that repeals of law by implication were not looked upon favorably, the Court decided that the Burke Act did not repeal the Act because the Burke Act enforced the contention that allotted land was to be “free from all restrictions as to sale, encumbrance or taxation.” *Id.* at 690-91 (citing 25 U.S.C. § 349). Further, it distinguished the decision in *Moe* from the decision in *Goudy*, noting that *Moe* was based upon personal jurisdiction with respect to taxation upon individual Indians, whereas *Goudy* was based upon *in rem* jurisdiction which subjected allotted lands to assessment and forced sale of the land for taxes upon becoming alienable and encumberable. *Yakima*, 112 S. Ct. at 691.

Next, the Court addressed whether the County’s assertion of jurisdiction over reservation fee patented land would create an impracticable “check-board” effect with respect to taxation

of land. *Id.* The Court held that parcel by parcel assessments were no different from immunities and exemptions used for the benefit of other groups such as churches, the federal government and the states. *Id.*

The Court further held that state jurisdiction over reservation fee patented land was not inconsistent with the policies of preserving Indian self-determination and self-government. The Court noted that while *in personam* jurisdiction would be disruptive to these policies (as they were in *Moe*), the power to assess property and collect taxes would not. *Yakima*, 112 S. Ct. at 692. The Court emphasized that the legislature, not the judiciary, was the correct forum to present these policy arguments because Congress, not the courts, had the power to repeal statutes. *Id.* (citing *Morton v. Mancari*, 417 U.S. 535 (1974)).

Finally, the Court addressed whether the County’s *ad valorem* and excise taxes were valid with respect to the reservation land. The Court applied its analysis to the County’s *ad valorem* tax upon land and held that because this tax flowed from taxation of land within the meaning of the Act, it was *prima facie* valid. *Id.* With respect to what Congress intended to preempt regarding state taxation, the Court held that a *per se* rule of interpretation must be followed which meant that whatever Congress decided was binding upon the courts. *Id.* at 693.

The Court then examined the excise tax the County sought to impose upon Yakima Nation’s property. The Court held that excise taxes were not permissible because although the object of the excise tax was the sale of the land, the land in question was not the object of the tax, and thus did not invoke the protection provided by the Burke Act. *Id.* The Court explained that whenever there are two possible constructions of a statute relating to the rights of American Indians, it was the custom of the Court to construe the statute liberally in favor of the Indians. *Id.* The Court further held that even

though an excise tax created a lien upon the land between the time the property was sold and the time the tax was paid, this lien did not convert the tax into a tax upon real estate; it remained a tax upon the Indians' activity of selling the land. *Id.* at 693-94.

In *County of Yakima v. Yakima Indian Nation*, the Supreme Court concluded that the Act explicitly authorized taxation of fee patented land but not taxation with respect to or involving land, or based upon the value of land. As a result, counties are forbidden to impose an excise tax on fee patented land. While this decision clarified the limits upon which a county may tax fee patented property held by individual tribe members, it also deprived these Indians of the federal protection from state and local taxation originally given to them by Congress.

- Carolyn M. Brennan

Dawson v. Delaware: EVIDENCE OF DEFENDANT'S RACIST ASSOCIATIONS OR BELIEFS NOT ADMISSIBLE IN CAPITAL SENTENCING PROCEEDING UNLESS RELEVANT TO THE ISSUES ADDRESSED IN THE UNDERLYING CONVICTION.

In *Dawson v. Delaware*, 112 S. Ct. 1093 (1992), the United States Supreme Court held that in a capital sentencing proceeding, evidence of the defendant's membership in a racist prison gang was inadmissible because it was not relevant to the issues being decided at the penalty proceeding or related to the underlying conviction. In vacating the judgment of the Supreme Court of Delaware, the Court determined that the admission of a stipulation evidencing the defendant's membership in the Aryan Brotherhood violated his First and Fourteenth Amendment rights under the United States Constitution.

David Dawson and three other inmates escaped from a Delaware prison in late 1986. After burglarizing a house in Kenton, Delaware, Dawson pro-

ceeded to another house nearby where he brutally murdered a white woman and then stole her car and money. Dawson was subsequently apprehended by the police.

At trial, the jury convicted Dawson of first-degree murder, possession of a deadly weapon during the commission of a felony, and various other crimes. A penalty hearing was then held before the jury to determine whether to impose the death penalty for the first degree murder conviction.

The State notified the court that it intended to introduce expert testimony pertaining to Dawson's membership in a prison gang known as the Aryan Brotherhood ("Brotherhood") as well as evidence of Dawson's tattoos and other indicia of his membership in the Brotherhood. The State submitted that such testimony would explain the origin and nature of the Brotherhood. Dawson opposed admission of such evidence arguing that its admission would be inflammatory and would violate his rights under the First and Fourteenth Amendments.

Prior to the start of the penalty hearing, the parties agreed upon a negotiated stipulation concerning the evidence of the defendant's membership in the Brotherhood. In essence, the stipulation stated that the Brotherhood was a white racist prison gang which originated in California and that separate gangs existed in Delaware using the same name. As a condition of the stipulation, the State did not introduce expert testimony during the penalty phase.

During the penalty hearing, the State introduced the stipulation, Dawson's tattoos relating to the Brotherhood, his use of the name "Abaddan," and his lengthy criminal record. In rebuttal, Dawson presented mitigating "good character" evidence consisting of testimony of family members and records of his enrollment in drug and alcohol programs in prison for which he had received good time credits.

The jury concluded that the mitigating evidence was outweighed by

the aggravating evidence and recommended that Dawson receive the death penalty. Upon that binding recommendation, Dawson was so sentenced.

The Supreme Court of Delaware, holding that it was desirable for the jury to have as much information before it as possible during the penalty hearing, affirmed the underlying conviction and the death penalty. The United States Supreme Court granted certiorari to consider whether the admission of evidence concerning Dawson's membership in the Brotherhood during the sentencing proceeding violated his First and Fourteenth Amendment constitutional rights.

The Court began its analysis by addressing Dawson's argument that the First Amendment absolutely barred the admission of evidence of an individual's beliefs or associations during a sentencing proceeding. *Dawson*, 112 S. Ct. at 1096. While recognizing that the First Amendment protects an "individual's right to join groups and associate with others," the Court rejected Dawson's assertion because it was overly broad. *Id.* By doing so, the Court reinforced its previous position that the sentencing authority is "free to consider a wide range of relevant material," even that material which may otherwise be constitutionally protected. *Id.* at 1097.

Having recognized that in certain instances otherwise constitutionally protected material may be admitted during a sentencing proceeding, the Court then considered whether the admission of the stipulation as to Dawson's membership in the Delaware chapter of the Brotherhood was constitutional error. *Id.* at 1097. The touchstone of the Court's inquiry was whether the stipulation was in any way relevant to the issues to be determined in the sentencing proceeding. *Id.*

The Court first noted that the absence of expert testimony to show the violent nature of the Brotherhood limited the relevancy of the admitted stipulation. *Id.* The Court reasoned that the narrow phrasing of the stipulation said